923 (7) (10)
59pgs
No. 06-713 and No. 06-730
FILED
AUG 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# In The Supreme Court of the United States

WASHINGTON STATE GRANGE,

*Petitioner,*

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; et al.,

*Respondents.*

STATE OF WASHINGTON, et al.,

*Petitioners,*

v.

WASHINGTON STATE REPUBLICAN PARTY; WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE; LIBERTARIAN PARTY OF WASHINGTON STATE; et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF FOR RESPONDENT WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE

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## QUESTION PRESENTED

Under Initiative 872, each candidate for partisan office freely self-selects a political party name that will be printed after his or her name on ballots without regard to the political party's willingness to have its name used by the candidate. A blanket primary then is used to determine, for each partisan office, which two candidates, and their self-selected associated party names, will advance to the general election ballot.

May the State of Washington force a political party to be associated on general election ballots with candidates for partisan office who have been neither selected by the party in accordance with its rules in a private process nor selected by the members of the party in a constitutional public primary?

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## INTRODUCTION

This case addresses the extent to which the State may force a political party and its supporters in the electorate to accept association in the electoral process with candidates who are not their choice and who are allowed by the State to appropriate the party's name and goodwill for their own political campaigns. Petitioners seek a ruling allowing the State to evade the First Amendment's strong protection for fundamental political activities based on a cosmetic change in an unconstitutional blanket primary. Protection for fundamental constitutional rights should depend upon substance, not form. The decisions below holding Washington Initiative 872 unconstitutional should be affirmed.[1]

## ADDITIONAL STATUTORY PROVISIONS INVOLVED

Washington's Modified Blanket Primary (Initiative 872):

**Sec. 8.** RCW 29A.04.310 and 2003 c 111 § 143 are each amended to read as follows:

((~~Nominating~~)) Primaries for general elections to be held in November must be held on:

[1] The Initiative is referred to throughout as "Initiative 872." References to Grange Pet. App. are to the appendix to the Washington State Grange's Petition for a Writ of Certiorari, Docket No. 06-713; references to J.A. are to the Joint Appendix; references to State Br. are to the Brief for the Petitioner, State of Washington, *et al.* (Docket No. 06-730); and references to Grange Br. are to the Brief for the Petitioner, Washington State Grange (Docket No. 06-713).

(1) The third Tuesday of the preceding September; or ((~~on~~))

(2) The seventh Tuesday immediately preceding ((~~such~~)) that general election, whichever occurs first.

**NEW SECTION. Sec. 11.** A new section is added to chapter 29A.32 RCW to read as follows:

The voters' pamphlet must also contain the political party preference or independent status where a candidate appearing on the ballot has expressed such a preference on his or her declaration of candidacy.

## STATEMENT OF THE CASE

### A. Washington's Partisan Government

Federal, state and many local offices in Washington are partisan. WASH. REV. CODE § 29A.52.111; J.A. 411-12 (Initiative 872, § 4). Political parties and party affiliation are embedded in Washington constitutional and statutory law. For example, the Washington Constitution requires that redistricting be done by a commission whose voting members are chosen by the leaders of "the two largest political parties in each house of the legislature." WASH. CONST. art. II, § 43.[2] The State Constitution requires that

[2] Each house of the state Legislature has an official party caucus. *See* Washington Senate Democratic Caucus, http://senatedemocrats.wa.gov (last visited August 1, 2007); Washington State Senate Republican Caucus, http://senaterepublicans.wa.gov (last visited August 1, 2007); Washington House Democrats, http://housedemocrats.wa.gov (last visited August 1, 2007); Washington House Republicans, http://houserepublicans.wa.gov (last visited August 1, 2007).

the replacement for a vacancy in legislative office be from the "same political party" as the departing legislator and be selected from a list submitted by the departing legislator's political party. *Id.*, art. II, § 15.[3] Numerous government boards explicitly require apportionment of members based on political party affiliation.[4]

## B. Partisan Campaigning in Washington

Under Initiative 872, any registered voter may become a candidate for a partisan office by filing a declaration of candidacy with the Secretary of State. J.A. 414-15 (Initiative 872, § 9). The declaration gives the candidate the option of identifying with a political party. J.A. 415

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[3] Initiative 872 could not change these constitutional provisions directly or by implication. *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762, 780 (Wash. 2000) ("The initiative process cannot be used to amend the constitution.").

[4] *See* WASH. REV. CODE § 34.05.610 (Joint Administrative Rules Review Committee); WASH. REV. CODE §§ 29A.44.410, 29A.44.420 (precinct election boards); WASH. REV. CODE § 36.70A.260 (Growth Management Hearing Boards); WASH. REV. CODE § 41.08.030 (Civil Service Commission); WASH. REV. CODE § 42.52.310 (Legislative Ethics Board); WASH. REV. CODE § 43.43.858 (Appointments to Organized Crime Advisory Board); WASH. REV. CODE § 42.17.350(1) (Public Disclosure Commission); WASH. REV. CODE § 44.04.220 (legislative children's oversight committee); WASH. REV. CODE § 44.28.010 (joint legislative review and audit committee); WASH. REV. CODE §§ 44.39.015, 44.39.025 (joint energy conservation and supply committee); WASH. REV. CODE § 44.55.020 (joint legislative oversight committee on trade policy; WASH. REV. CODE § 47.60.310 (ferry terminal area committees); WASH. REV. CODE § 80.01.010 (Utilities and Transportation Commission); WASH. REV. CODE § 82.03.020 (Tax Appeals Board); WASH. ADMIN. CODE 223-08-005 (forest practice appeals board); WASH. ADMIN. CODE 306-01-020 (Law Revision Commission); WASH. ADMIN. CODE 342-10-160 (Oceanographic Commission); WASH. ADMIN. CODE 371-08-315 (Pollution Control Hearings Board).

(Initiative 872, § 9(3)). The candidate may name any party without regard to the party's preference or the candidate's actual partisan activities. The State then places the name of the party listed on the declaration next to the candidate's name on the primary election ballot. J.A. 413-14 (Initiative 872, § 7(3)). A political party has no power to stop the use of its name by candidates, even if those candidates are dedicated activists for an opposing party.

In the primary election, Initiative 872 allows every voter to vote for any candidate, regardless of that voter's party affiliation. J.A. 412 (Initiative 872, § 5). At no point does a voter have to declare a party preference, so that voters who otherwise identify themselves as Republicans may cast votes for candidates listed as Democrats and *vice versa*.[5] A voter may vote for a "Republican" for one office, a "Democrat" for another and a "Libertarian" for a third. Under this process, voters who are loyal to one party may vote for one of their own as the candidate of an opposing party. For example, a candidate who may be a dedicated member of the Republican State Committee could declare as a Democrat, be identified on the primary ballot as a Democrat, and receive enough Democratic, Republican, and other votes in the primary to emerge as the Democratic Party's standard bearer for the general election. Moreover, under Initiative 872, voters who have a high level of fidelity to a party may be deceived by the misuse of party labels on the ballot into voting for candidates who are actually committed to the goals of an opposing party.

Under Initiative 872, the two candidates for any office who receive the most votes advance to the general election.

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[5] There is no party registration for voters in Washington.

J.A. 412-13 (Initiative 872, § 6(1)). Under this "top two" system, it is possible that the two general election candidates for an office will be of the same party.

Initiative 872, adopted in 2004, overrode a partisan primary system that was enacted by the Washington Legislature, also in 2004, to replace Washington's unconstitutional blanket primary.[6] Under the Legislature's system, major political party candidates advance to the general election by receiving the most votes in a primary in which voters are limited to voting for the candidates of only one party, thus indicating their affiliation with that party on the day of voting. WASH. REV. CODE §§ 29A.52.151, 29A.36.106, 29A.36.191, 29A.36.201. Under the Legislature's system, an independent candidate, or a candidate nominated for office by a minor party, is automatically entitled to appear on the general election ballot. WASH. REV. CODE §§ 29A.20.111, 29A.36.011, 29A.36.201, 29A.52.321. In contrast, under Initiative 872, minor party and independent candidates must compete against major political party candidates in a blanket primary and will reach the general election ballot only if they are one of the

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[6] In 2004, Washington's blanket primary was declared unconstitutional after four years of litigation between Washington's three major political parties, the Washington State Grange (the "Grange") and the Washington Secretary of State. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003), *cert. denied*, 540 U.S. 1213, and *cert. denied*, 541 U.S. 957 (2004). This Court previously examined Washington's blanket primary and its effects in connection with California's blanket primary. The data from Washington showed the dangers of a blanket primary: "One expert testified . . . that in Washington the number of voters crossing over from one party to another can rise to as high as 25 percent . . . and another that only 25 to 33 percent of all Washington voters limit themselves to candidates of one party throughout the ballot." *California Democratic Party v. Jones*, 530 U.S. 567, 578 (2000) (internal citations omitted).

top two vote-getters. J.A. 412-14 (Initiative 872, §§ 6(1), 7). For minor party and independent candidates, Initiative 872 therefore imposes greater hurdles to an appearance on the general election ballot.[7]

Initiative 872 did not alter the fundamentally partisan nature of Washington's electoral system, however.[8] Washington's electoral system is organized on explicitly partisan lines, and campaign contributions are regulated in conjunction with this partisan organization. For example, under both Initiative 872 and the Legislature's system, candidates must register and report campaign contributions and expenditures and, as part of that registration, state their party affiliation. Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. §§ 432(e), 433(a); WASH. REV. CODE §§ 42.17.020(38), 42.17.040. Under both systems, a political committee's statement of organization requires the committee to state the "party affiliation" of each candidate supported or opposed. FECA § 434(b)(5); WASH. REV. CODE § 42.17.040(2)(f).[9] Under both systems, during any campaign for partisan office, a candidate must

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[7] In addition, under the Legislature's system, minor party and independent candidates must be nominated by a convention or *ad hoc* meeting before the party's name can be used by the candidate. If multiple candidates wish to use the same minor party name, the issue is resolved through a summary court procedure. WASH. REV. CODE §§ 29A.20.121, 29A.20.171. By contrast, under Initiative 872, any candidate who desires to do so may freely use a minor (or major) party name.

[8] The Attorney-General summarized its effects in the 2004 Voter's Pamphlet: "[Initiative 872] would change the way candidates qualify to appear on the general election ballot, but would not otherwise change the way general elections are conducted." J.A. 405.

[9] A "candidate" is one who "seeks nomination for election, or election, to [office]." FECA § 431(2); WASH. REV. CODE § 42.17.020(9).

continue to identify his or her party affiliation (as indicated in his or her declaration of candidacy) in all campaign advertising. WASH. REV. CODE § 42.17.510(1). All political advertising mentioning the candidate also must include his or her political party.

> [S]ponsors of advertising supporting or opposing a candidate who has expressed a party or independent preference on the declaration of candidacy must clearly identify the candidate's political party or independent status in the advertising.
>
> . . . .
>
> To assist sponsors in complying with this requirement, the commission shall publish a list of abbreviations or symbols that clearly identify *political party affiliation* or independent status.

WASH. ADMIN. CODE 390-18-020(1), (3) (emphasis added).

Under both systems, contributions to candidates for office are limited. *See* FECA § 441(a); WASH. REV. CODE § 42.17.610 *et seq.* Bona fide political parties have higher limitations on their contributions and expenditures in state partisan races than other political committees.[10] For example, contributions to candidates for State legislative office are limited to $700 per person, and contributions to candidates for other State offices are limited to $1400 per person. WASH. REV. CODE § 42.17.640(2), (3). These limits

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[10] A bona fide political party is either a governing arm of a major political party or a minor party that nominates a candidate pursuant to WASH. REV. CODE § 29A.20.010 *et seq.* As the Initiative repealed the minor party nominating statutes, Grange Pet. App. 83a. at n.25, under Initiative 872 there is no longer a statutory basis to include a minor political party within the definition of a "bona fide political party."

do not apply to a "bona fide political party" or a "caucus political committee." *Id.*

## C. Political Party Names and Washington Ballots

Since Congress created the Washington Territory,[11] political parties have played a leading role in shaping its public debate. In the first major territorial election in Washington, candidates' party affiliations were prominently reported.[12] Then, as now, party affiliations associated the candidates with specific positions on issues that were important to the voters of the day, such as possible annexation of Hawaii, the disposition of lands held by the British Hudson Bay Company, and public funding for the Pacific Railway.[13] Party affiliation informed voters as to the likelihood that a candidate would align with the majority or minority party in Congress or with then-President

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[11] *See* An Act to Establish the Territorial Government of Washington, 10 Stat. 172 (Mar. 2. 1853).

[12] "Col. [J. Patten Anderson] is a [D]emocrat of the purest kind – is a young man of the highest moral worth – possessing the order of talents, and who in discharge of his first duty as Marshal, in taking the census, has learned the character of our territory, its interests, and its wants. Should he be the nominee of the [D]emocratic convention, his election of course will be certain. . . ." Vox Populi [pseudonym], Letter to the Editor, WASH. PIONEER, Dec. 10, 1853, at 2, col. 4. The *Washington Pioneer* later reprinted a quote, attributed to Jefferson Davis, that Colonel Anderson "was one of the best [D]emocrats, most worthy and promising young men in the State of Mississippi." *Candidates Before the Convention*, WASH. PIONEER, Jan. 21, 1854, at 2.

[13] *See Whig Nomination for Congress – Position of Parties – Anticipated Result of Election*, WASH. PIONEER, Jan. 7, 1854, at 2. Thus, for example, it was advertised that a Democratic candidate for delegate would support purchase of the "Sandwich Islands" (Hawaii), and encourage the railroad to be constructed by "private enterprise" with a termination point at Puget Sound. *Id.*

Franklin Pierce – a significant consideration at the time with respect to the protection of territorial interests in Washington, D.C.[14]

Washington adopted its first state election laws upon entering the union in 1889. Washington's first election ballots had to name the "party or principle" that each candidate "represents." 1889-90 Wash. Sess. Laws, ch. XIII, § 17. This conjunction of party name and candidate name on ballots has continued ever since.

In 1907, Washington required major political parties to use public primaries to select their general election candidates. "Hereafter, all candidates for elective office . . . shall be nominated at a direct primary election held in pursuance of this act." 1907 Wash. Sess. Laws, ch. 209, § 2. Political organizations previously "represented" on the ballot were entitled to have a "separate primary election ticket" and to use separate primary ballots. *Id.* at §§ 6, 11. A voter seeking a party ballot, if challenged, was required to affirm affiliation with the party whose ballot was sought. *Id.* at § 12. Candidates were required to swear

[14] In 1854, it was urged that a vote for a Democratic candidate, as opposed to a Whig candidate, would carry more weight, as Democrats held a congressional majority and because President Pierce was a Democrat: "But what advantage could possibly accrue to our Territory by sending to Congress any other than an unmistakable Democrat. With a Democratic administration in power at Washington – with an overwhelming majority in both branches of Congress – with Democratic Territorial officials, and the prospect of our party being largely in the majority in the Legislative Assembly, what motive could induse [sic] the people to select a Delegate who would be everywhere, in his official position, in the minority . . . ? . . . It were not only folly, but imbecility to suppose that the interests of the Territory could be advanced equally by a Democratic or Whig candidate to Congress. . . ." *Whig Nomination for Congress*, *supra* note 13.

that they were members of the political party they sought to represent and to declare themselves candidates for nomination by the party to particular offices. *Id.* at § 4. The winners of the primary became the "nominees of the said political parties of which they are candidates." *Id.* at § 24(3).

From 1935 until 2004, Washington forced political parties to select their candidates in a "blanket primary," where non-party members could participate and influence the choice of candidates. REM. REV. STAT. OF WASH., ch. 26, § 5195-1 (1935). Each ballot in the blanket primary carried the names of all candidates from all parties, and each candidate's name was followed by his or her political party. WASH. REV. CODE §§ 29.030.095, 29.030.020(3), *invalidated by Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003). The candidate receiving the plurality of votes cast in the primary for candidates of that same party became the party's nominee at the general election. State Br. 11.

Following the invalidation of Washington's blanket primary in 2004, Washington replaced the blanket primary with the Legislature's system described above.[15]

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[15] *See supra* note 6. The adoption of the replacement also led to litigation. *See Washington State Grange v. Locke*, 105 P.3d 9 (Wash. 2004). The legislation sent to the Governor was entitled "An Act relating to a Qualifying Primary" and included both a "Montana" style primary and a "top two" primary similar to Initiative 872. The Governor vetoed the "top two" portion of the bill, citing a number of concerns including a concern "that the top two primary system would effectively deny minority and independent candidates access to the general election ballot." *Id.* at 14. The Grange challenged the adoption of the "Montana" style primary itself as well as the Governor's veto of legislation creating a primary similar to Initiative 872, arguing that a

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### D. The Blanket Primary Returns as Initiative 872.

The Washington State Grange (the "Grange") was not satisfied with Washington's replacement primary. As soon as the Governor signed the 2004 replacement primary law, the Grange launched an initiative campaign to "institute a 'modified' blanket primary system . . . in which voters will not be restricted to choosing among the candidates of only one party in a primary election." J.A. 798. "Our initiative will put a system in place which looks almost identical to the blanket primary system we've been using for nearly 70 years," said Grange President Terry Hunt. J.A. 798.

The Grange's campaign material explained to voters Initiative 872's mechanics:

> At the primary, the candidates for each office will be listed under the title of that office, the party *designations* will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (*just as they do now* in the blanket primary).

J.A. 69 (emphasis added).

According to the Grange, Initiative 872's purpose was to allow non-members of parties to exercise the same control over partisan candidate selection and party messaging that they had under the unconstitutional blanket primary: "Initiative 872 gives voters this freedom to choose any candidate in the primary. . . . [It] gives voters the kind

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"Montana" primary was not a "qualifying primary" and thus was not within the scope of the bill subject. The Washington Supreme Court disagreed, holding that the everyday meaning of "qualifying primary" did encompass a "Montana" primary. *Id.* at 20-21.

of control that they exercised for seventy years under the blanket primary." J.A. 78-79.

Initiative 872 was intended to force political parties to alter their selection of candidates and campaign messages. "Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters." J.A. 406. Adoption of Initiative 872 would "force" political parties to recruit mainstream candidates and thereby coerce the candidates to run campaigns appealing to the entire electorate, not just supporters of the party in whose name they ran. *See* J.A. 70, 73, 406.

Initiative 872 passed in November 2004 and became law 30 days later. WASH. CONST. art. II, § 1(d). Under the Initiative, any candidate who so requested could use any political party's name after his or her name on election ballots. J.A. 413-14 (Initiative 872, §§ 7(3), 12). Election officials refused to recognize separate party nomination processes. J.A. 104-11.

As promised, Initiative 872 effectively reinstituted the blanket primary, but it otherwise made no fundamental changes in Washington's election processes or partisan organization of government. It did not repeal the exemption for major political parties from contribution limitations, or the requirement that advertising in partisan races indicate the candidate's political party affiliation as specified in the declaration of candidacy, or the numerous restrictions on board and commission membership based on party affiliation.

## E. The Washington State Democratic Party Rules Relating to Candidate Selection

The Democratic Party has rules governing the use of its name by candidates in general elections.[16] The reasonableness of these rules has not been challenged.

The Washington State Democratic Party is constituted pursuant to its Charter.[17] J.A. 236. According to Charter Article VII(C)(3), Democratic candidates and nominees must be chosen by Democrats, except that by special bylaw, the Party may allow participation by voters who do not wish to disclose their Democratic affiliation. J.A. 258. These policies are crucial for the party to function effectively:

> The goals of the [Democratic] Party include adopting statements of policy to serve as standards for Democratic elected officials and goals for the people of the state, nominating and assisting in the election of Democratic candidates at all levels who support the goals of the Party, and working with elected Democratic public officials at all levels to achieve the goals of the Democratic Party. The close relationship ... is fostered by requiring that the selection of candidates using the party name be done by voters who affiliate with the Democratic Party.

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[16] These rules apply unless the State requires the party to select its general election candidates in a constitutional public partisan primary in which participation by non-Democrats is limited, consistent with this Court's decisions in *Jones* and *Tashjian*. *See Jones*, 530 U.S. at 572.

[17] The Charter was adopted at the Washington State Democratic Convention in 1976, and thereafter amended. Under Washington law the "state convention of a major political party is the ultimate repository of statewide party authority." *King County Republican Central Comm. v. Republican State Comm.*, 484 P.2d 387, 392 (Wash. 1971).

. . . .

> . . . The Party has expended considerable time and expense to develop a coherent set of goals and principles that guide the Party, and to create a corresponding "brand awareness" among the electorate for candidates identified as Democrats. Allowing any candidate, even those that are hostile to the Party, to misappropriate the Party name and appear on the ballot as a Democratic candidate will undermine this name association that has built up in loyal Party voters' mind.

J.A. 236-37, 239.

The Charter limitations are implemented by the Bylaws of the Washington State Democratic Party:

> [C]andidates and nominees for public office who are or will be identified as Democrats or publicly associated with the Democratic Party to any extent in the general election for such office must be selected in accordance with Rules adopted by the State Central Committee. . . . In connection with any selection process in which voters who are not members of the Democratic Party are permitted to participate, the State Central Committee may require that candidates demonstrate prior to filing for office reasonable support from Party members in order to be eligible to participate in the selection process. . . .

J.A. 164-65 (Bylaws: Articles XI.B, XI.C).

Pursuant to these Bylaws, the Washington State Democratic Central Committee has adopted Rules for the Selection of Candidates and Nominees for Public Office. J.A. 265-74. These rules require that candidates associated with the Democratic Party on election ballots be

chosen either (1) by a public primary, in which affiliates of other political parties cannot participate in the selection of Democratic candidates for advancement, or (2) by a specified private meeting of Democrats. A candidate must also demonstrate a modicum of support from Democratic voters to be eligible as a Democratic candidate or nominee. J.A. 273-74.

## F. Procedural History

After adoption of Initiative 872, the Republican and Democratic parties instituted alternative private processes for nominating candidates for the November 2005 local partisan races. The Republican Party requested assurance from election officials that these political party nomination processes would be recognized. J.A. 82-87. Election officials refused to give that assurance and indicated that any nomination process by political parties would be ignored in connection with candidate filings in partisan elections. J.A. 104-11.

Shortly thereafter, the Republican Party filed suit against local election officials in the United States District Court for the Western District of Washington, seeking to permanently enjoin Initiative 872 as unconstitutional. Washington's two other major political parties, the Democratic and Libertarian Parties, immediately intervened as additional plaintiffs. J.A. 18-20, 39-42. The Grange then also intervened to defend Initiative 872, and the Secretary of State followed to represent all election officials and the State.

### 1. The District Court Enjoins Initiative 872.

The political parties asserted that Initiative 872 severely burdened their right of association under the First Amendment, U.S. CONST. amend. I, by compelling them to associate with candidates they have not chosen (nor are allowed to choose), forcing them to adulterate their candidate selection process by accepting participants ineligible under their rules, and depriving them of their right to select their standard bearers. Additionally, the parties challenged Initiative 872 on Equal Protection grounds, arguing that by allowing minor political parties to nominate candidates but not major parties, the Initiative denied equal rights to the major political parties.[18]

The district court determined that Initiative 872 severely burdened the political parties' right of association. Specifically, Initiative 872 prevented political parties from exercising their constitutional right to nominate their candidates and converted any attempt by parties to do so into a mere endorsement. The district court reasoned that endorsement is not a constitutionally acceptable substitute for a party's selection of its own candidates, citing this Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). Grange Pet. App. 66a.

The district court found that Initiative 872 forced the parties to associate with unwanted candidates on ballots. The district court rejected arguments that printing party preferences on ballots did not imply nomination,

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[18] The district court did not resolve the Equal Protection issues in light of its conclusion that Initiative 872 was unconstitutional and that, if it were constitutional, it repealed the minor party nomination statutes which created the Equal Protection issues. Grange Pet. App. 84a.

endorsement or support of the candidate by the party. The court noted, among other things, that statutes left untouched by Initiative 872 demonstrate that the party name was used on the ballot as a party designation for party candidates, recognizing, "[a]ny attempt to distinguish a 'preferred party' from an 'affiliated party' is unavailing in light of Washington law." Grange Pet. App. 68a. The court also rejected the Grange's argument that candidates had a First Amendment right to use a political party's name on ballots: "An individual has no right to associate with a political party that is an 'unwilling partner.'" Grange Pet. App. 69a. "The Court is persuaded . . . that allowing any candidate, including those who may oppose party principles and goals, to appear on the ballot with a party designation will foster confusion and dilute the party's ability to rally support behind its candidates." Grange Pet. App. 79a.

The court also ruled that Initiative 872 was "[i]n all constitutionally relevant respects . . . identical to the blanket primary invalidated [in the parties' 2000-2004 litigation]." Grange Pet. App. 72a.[19]

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[19] The district court found that Initiative 872 was not materially different from the blanket primary based on six factors:

> (1) Initiative 872 allows candidates to designate a party preference when filing for office, without participation or consent of the party; (2) requires that the political party candidates be nominated in Washington's primary; (3) identifies candidates on the primary ballot with party preference; (4) allows voters to vote for any candidate for any office without regard to party preference; (5) allows the use of an open, consolidated primary ballot that is not limited by political party and allows crossover voting; and (6) advances candidates to the general election based on open, "blanket" voting.

Grange Pet. App. 72a.

> Primary voters [under Initiative 872] are choosing a party's nominee. Initiative 872 burdens the rights of the political parties to choose their own nominee by compelling the parties to accept any candidate who declares a 'preference' for the party, and allowing unaffiliated voters to participate in the selection of the party's candidate . . . *Jones* allows little room for 'outside' involvement in 'intraparty' competition.

Grange Pet. App. 71a.

Because Initiative 872 imposed a severe burden on the political parties' First Amendment rights, the district court determined that the Initiative was unconstitutional unless narrowly tailored to advance a compelling state interest. The court observed, however, that "[t]he State of Washington and the Washington State Grange *do not argue* that Initiative 872 is narrowly tailored to meet a compelling state interest." Grange Pet. App. 75a (emphasis added). According, the district court found it was unconstitutional. Grange Pet. App. 79a.

Finally, the district court analyzed whether the use of party names by candidates under Initiative 872 could be severed from the remaining constitutional provisions under State law. It reasoned that "the effect of [the] deletions would be to substantially dismantle the partisan primary system adopted by Initiative 872," and thus concluded the Initiative was not severable. Grange Pet. App. 89a.[20] Based on these findings, the district court

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[20] A nonpartisan election system is inconsistent with what the sponsors told voters they would get if they passed Initiative 872. In a Frequently Asked Questions document posted on the "Yes on 872" website in January 2004, the Grange stressed that government in

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enjoined implementation of Initiative 872. Grange Pet. App. 91a-92a.

### 2. The Court of Appeals Affirms the District Court.

On review, a unanimous panel of the U.S. Court of Appeals for the Ninth Circuit upheld the district court. It found that Initiative 872 retains a partisan primary, in which each candidate can self-identify on ballots with a political party regardless of the party's willingness to associate with the candidate.

> Given that the statement of party preference is the sole indication of political affiliation shown on the ballot, that statement creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate. The practical result of a primary conducted pursuant to Initiative 872 is that a political party's members are unilaterally associated on an undifferentiated basis with all candidates who, at their discretion, "prefer" that party.

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Washington would remain partisan and candidates' parties would continue to be indicated on ballots:

> **If Washington adopts a qualifying primary, does this mean that the offices become nonpartisan?**
>
> No. Candidates *will continue* to express a political party preference when they file for office and that party designation will appear on the ballot. An office would only become nonpartisan if the Legislature adopts a statute prohibiting party designations on the ballot for candidates for that office.

J.A. 73 (emphasis added).

Grange Pet. App. 22a. "Such an assertion of association by the candidates against the will of the parties and their membership constitutes a severe burden on political parties' associational rights." Grange Pet. App. 25a.

The court rejected petitioners' arguments that Initiative 872 created a nonpartisan blanket primary as discussed in *Jones*. Grange Pet. App. 15a. The panel concluded that the term "nonpartisan" in *Jones* contemplated "elections in which primary voters play no role in the nomination of any candidate as the representative of a political party." Grange Pet. App. 18a.

> The Initiative thus perpetuates the "constitutionally crucial" flaw *Jones* found in California's partisan primary system. Not only does a candidate's expression of a party preference on the ballot cause the primary to remain partisan, but in effect it forces political parties to be associated with self-identified candidates not of the parties' choosing. This constitutes a severe burden upon the parties' associational rights.

Grange Pet. App. 19a-20a.

The panel noted that neither the State nor the Grange had identified any compelling state interest advanced by Initiative 872 and, in any event, that Initiative 872 was not narrowly tailored. Grange Pet. App. 3a-4a. In the absence of any articulation by the State or the Grange of any compelling state interest, the Court of Appeals attempted to "read compelling state interests between the lines of their arguments[.]" Grange Pet. App. 30a. It determined that the interests were essentially the same as those articulated and found inadequate by this Court in *Jones* and that such interests could be "sufficiently served by a more narrowly tailored primary system." Grange Pet.

App. 30a. Accordingly, it affirmed the district court's conclusion that Initiative 872 was unconstitutional. With respect to severability, the Court of Appeals determined that it was "not reasonable to believe that Washington voters would have passed Initiative 872 if they knew it would result in nonpartisan primaries for all statewide offices." Grange Pet. App. 33a.

The State and Grange petitioned for a writ of *certiorari*, which this Court granted.

## SUMMARY OF ARGUMENT

Initiative 872 achieves what this Court has characterized as a "stark repudiation of freedom of political association." *California Democratic Party v. Jones*, 530 U.S. 567, 582 (2000). In both intent and practice, the Initiative resurrected a partisan primary system virtually identical to the one *Jones* held unconstitutional. Like the unconstitutional blanket primary it emulates, Initiative 872 has the likely outcome – indeed the intended outcome – of changing the parties' message against their will. Under the First Amendment, the State may not force political parties to select candidates other than those they would select of their own accord. A "party's choice of a candidate is the most effective way in which that party can communicate to the voters what the party represents and, thereby, attract voter interest and support." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 (1992) (Stevens, J., dissenting). Initiative 872 severely burdens the parties' rights of association, and neither the State nor the Grange has articulated how the Initiative is narrowly tailored to advance a compelling state interest.

Initiative 872 is not the same as the hypothetical nonpartisan blanket primary described in *Jones*. The Court discussed a nonpartisan blanket primary only as an example of the narrow tailoring required to justify a severe burden on First Amendment rights, where compelling state interests were assumed to exist. The Court did not suggest that a nonpartisan blanket primary necessarily imposed no severe burden on First Amendment rights and, moreover, Petitioners have never identified a compelling state interest served by Initiative 872.

Nor, as the State contends, does Initiative 872 remove the State from the party nominating process. The State has it backwards: Initiative 872 removes the *party* from *its own* nominating process. Initiative 872 forces party supporters to loan their party's name to any candidate who wishes to use it, while barring party supporters from selecting a candidate who will carry their party's name on the general election ballot. In so doing, Initiative 872 prohibits the exercise of well-recognized rights of political parties. The district court and Court of Appeals correctly applied the analytical framework that this Court has clearly articulated, first determining the character and magnitude of the burden on First Amendment rights of association posed by Initiative 872, then considering the interests offered by the State both to justify that burden and the extent to which it was necessary to satisfy legitimate interests. Relying on that analysis, both courts found Initiative 872 unconstitutional.

The Grange stands alone in making several red herring arguments, none of which justify reversal. First, the Grange asserts that the First Amendment rights of a political party to determine its own message and select

those who speak in its name are outweighed by a candidate's claimed First Amendment right to compel association with the party on an election ballot. A candidate has no such right. Second, the Grange asserts that the lower courts should have severed the Initiative's requirement that a candidate's choice of party be printed on the ballot in order to save the Initiative. Such a rewriting of the Initiative by the courts would effectively convert Washington State's partisan system of government into a nonpartisan system. The use of party labels on ballots by candidates and the burdens imposed by Initiative 872 upon First Amendment rights are not incidental to the main purpose of the Initiative – they *are the main purpose* of the Initiative. The Court of Appeals and district court correctly concluded that the Initiative was not severable. Third, the Grange asserts that in the interests of protecting a State's freedom to serve as a laboratory of democracy, this Court should uphold Initiative 872. Federalism does not require this Court to look the other way when a State intentionally invades core First Amendment rights for no good reason.

The Court of Appeals and the district court correctly declared Initiative 872 unconstitutional. Their decisions should be affirmed.

## ARGUMENT

### A. Initiative 872 Violates the Freedom of Association of Political Parties.

Initiative 872 uses the power of the state to compel political parties to associate with candidates who have not been selected by the members of the party. It violates the

right of freedom of political association recognized in *Jones*.

### 1. A Political Party's Candidates are Part of its Message.

A political party's selection of candidates for the ballot is inherently part of its political message. This Court consistently has recognized the fundamental connection between choosing candidates for a party and choosing a message for a party.

> In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views.

*Jones*, 530 U.S. at 575. "[R]egulating the identity of the parties' leaders . . . may color the parties' message and interfere with the parties' decisions as to the best means to promote that message." *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 231 n.21 (1989).

"It is through its candidates that a party is able to give voice to its political views, to engage other candidates on important issues of the day, and to affect change in the government of our society." *Clingman v. Beaver*, 544 U.S. 581, 612 (2005) (Stevens, J., dissenting). "Nominees of the party bring their images and visibility, their priorities and positions on issues to the party. In the eyes of many voters, *they are the party*. Their quality and ability also determine, to a considerable extent, the party's chance for

victory in the general election." PAUL ALLEN BECK, PARTY POLITICS IN AMERICA 196 (8th ed. 1997) (emphasis added). Thus, the selection of a candidate for office "is an ultimate and crucial element of the party members' political activities." *Nader v. Schaffer*, 417 F. Supp. 837, 844 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976).

### 2. The First Amendment Guarantees a Political Party the Right to Determine its Message.

Forcing, as Initiative 872 intends to do, political parties to choose candidates congenial to the majority, rather than candidates who may better articulate the party's message, offends the First Amendment:

> Both of these supposed [compelling state] interests, therefore, reduce to nothing more than a stark repudiation of freedom of political association: Parties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority.
>
> We have recognized the inadmissibility of this sort of "interest" before. In *Hurley* . . . we held [that the law's] "object [was] simply to require speakers to modify the content of their expression to whatever extent beneficiaries of the law choose to alter it with messages of their own. . . . [I]n the absence of some further, legitimate end, this object is merely to allow exactly what the general rule of speaker's autonomy forbids."

*Jones*, 530 U.S. at 582 (internal citation omitted).[21]

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[21] "[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his

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The State may not force associations on political organizations to encourage popular views or discourage unpopular views. *Cf. Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) ("the law . . . may not interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may seem."). A political organization has the right to choose which issues it wants to emphasize through its candidates and which it wants to ignore. *Cf. id.* at 655-56 ("The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment right to choose to send one message and not the other.").

### 3. Initiative 872 is Unconstitutional Because it Places a Severe Burden on First Amendment Rights and is Not Narrowly Tailored to Advance a Compelling State Interest.

As was the case in *Jones*, altering political party messages is not just the likely outcome of the Initiative 872, it is the *intended* outcome. *See, e.g.*, J.A. 70 ("This proposed initiative will ensure that the candidates who appear on the general election ballot are those who have the most support from the voters, not just the support of the political party leadership."); J.A. 78 ("Parties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters[.]"). Like the blanket

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own message." *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 566, 573 (1995).

primary struck down in *Jones*, Initiative 872 places the heaviest burden imaginable upon the associational rights of political parties.

Initiative 872 forces political parties to change their message in at least two ways. First, it takes away from the political party the fundamental choice of whether to continue an internal debate by advancing a ticket of candidates with differing views on issues or to end the debate by selecting a single candidate and rallying behind him or her. Under Initiative 872, that choice is made by the entire electorate, not a party's adherents. Second, by allowing the whole of the electorate to make the choice of which party candidates will advance to the general election, it encourages candidates to talk only about issues that are congenial to the majority. It discourages candidates from bringing new and controversial ideas into the political debate and building support over time for those issues which the candidate and the party may believe are critical to the future well being of the country even if rejected (or even despised) by mainstream voters.

The State's assertion that parties are not harmed by Initiative 872 because they remain able to endorse candidates and expend finite party resources helping those candidates wrest the party's name away from drive-by candidates is an irrelevant response that highlights – not excuses – the burden placed upon associational rights: "The ability of the party leadership to endorse a candidate is simply no substitute for the party members' ability to choose their own nominee." *Jones*, 530 U.S. at 580.[22] It is

[22] "[T]he ability of the party leadership to endorse a candidate does not assist the party rank and file, who may not themselves agree with

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also a particularly disingenuous argument since Washington's political advertising statutes and regulations require that after a drive-by candidate co-opts a political party's name at filing, any advertising by the party to distance itself from the candidate must nevertheless state that the candidate is in fact affiliated with the party, even if the point of the advertising is to say the candidate and his or her positions are anathema to the party. WASH. ADMIN. CODE 390-18-020.[23]

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the party leadership, but do not want the party's choice decided by outsiders." *Jones*, 530 U.S. at 581.

[23] Campaign finance laws also limit a party's ability to assist an endorsed candidate in distinguishing him or herself from other candidates using the party name. These limitations on coordinated party expenditures, much like expenditure limits in general, burden parties speech by "preclud[ing them] from effectively amplifying the voice of their adherents," *Buckley v. Valeo*, 424 U.S. 1, 22 (1976), rendering the party impotent to convey who is its genuine "ambassador to the generate electorate." *Jones*, 530 U.S. at 575.

> Federal campaign finance laws place strict limits on the manner and amount of speech parties may undertake in aid of candidates. Of particular relevance are limits on coordinated party expenditures, which the Federal Election Campaign Act of 1971 deems to be contributions subject to specific monetary restrictions. *See* 90 Stat. 488, 2 U.S.C. s. 441a(a)(7)(B)(i).

530 U.S. at 588 (Kennedy, J. concurring). Justice Kennedy emphasized that based on this Court's decision in *Colorado Republicans Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996), a majority of this Court concluded that "Congress or a State may limit the amount a political party spends in direct collaboration with its preferred candidate for elected office." *Jones*, 530 U.S. at 588 (Kennedy, J. concurring).

Political parties under Initiative 872 find their associational rights wrapped in a constitutional straight jacket: Unable to control the use of their name and forced to expend resources in order to effectively distinguish their preferred candidate during the primary, the parties now find their freedom of speech restricted in the amount of resources

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When the State scripts an organization's message, selects the messenger, and limits how much support the messenger may enjoy, it has fundamentally and severely burdened core First Amendment freedoms. Initiative 872 does just that. It is therefore unconstitutional unless narrowly tailored to advance a compelling state interest. *Timmons*, 520 U.S. at 358; *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The burden of proof is on the defenders of the Initiative to demonstrate that it advances a compelling state interest, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786 (1978), and to show that it "is narrowly drawn to achieve that end." *Boos v. Berry*, 485 U.S. 312, 321 (1988) (quoting *Perry Education Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)).

As both the district court and the Court of Appeals recognized, Petitioners have failed to *identify* any compelling interest, much less demonstrate that Initiative 872 advances one.[24] Moreover, any potential legitimate compelling interest advanced by Initiative 872 would be equally well advanced by allowing a candidate to use a political party's name on the ballot only when that party has

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they can legally expend to promote "vigorous and open support of [their] favored candidate[.]" *Id.* at 589.

[24] Although Petitioners do not assert any compelling interest, they advance the justification that under Initiative 872, "[p]arties will have to recruit candidates with broad public support and run campaigns that appeal to all the voters." J.A. 78. Parties that aim to win must certainly seek broad public support. However, there can be new, small or temporary parties that participate in elections to achieve other goals, such as spreading new political ideas and building a base of support for them or even just opposing a particular measure. They may not expect to win immediately. The State has no interest in promoting "mainstream" candidates over those whose ideas are not going to capture majority support in the electorate. *See Jones*, 530 U.S. at 582.

selected that candidate as one of its standard bearers. Candidates would remain free to run using only their own names or to form their own political parties whose name they could then use. Petitioners cannot argue that Initiative 872 is narrowly drawn.[25]

## B. Initiative 872 Does Not Create a "Nonpartisan" Blanket Primary, Nor is Such a Primary Immune from Constitutional Scrutiny.

Petitioners erroneously contend that Initiative 872 is a "nonpartisan blanket primary" as described in *Jones* and, therefore, receives a free pass under the First Amendment. Petitioners rely upon this quote from the opinion:

> *[E]ven if all these state interests were compelling ones*, Proposition 198 is not a narrowly tailored means of furthering them. Respondents could protect them all by resorting to a nonpartisan blanket primary. Generally speaking, under such a system, the State determines what qualifications it requires for a candidate to have a place on the primary ballot – which may include nomination by established parties and voter-petition requirements for independent candidates. Each

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[25] The State asserts that "primaries are not the exclusive method of determining party nominees, nor is determining party nominees the exclusive purpose of a primary or opening round election." State Br. 7. While that may be true, it is equally true that use of the alternative methods described by the State, such as cumulative voting or instant runoff voting, need not interfere with a political party's right to select its candidates. Any such system can be readily tailored to limit use of party names on ballots to candidates selected by the party without interfering in any material respect with the purpose of the alternative system.

> voter, regardless of party affiliation, may then vote for any candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election.

530 U.S. at 585-86 (emphasis added).[26]

Petitioners' argument fails for two alternative reasons. First, the Court's observation does not suggest that a nonpartisan blanket primary necessarily imposes no burden on First Amendment rights. On the contrary, a nonpartisan blanket primary is suggested as a means of narrow tailoring when imposing severe burdens on First Amendment rights in order to advance compelling state interests. Second, Initiative 872 created a partisan blanket primary.

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[26] The Grange characterizes this portion of the opinion as the *Jones's* "legal ruling," asserting that "*Jones* held" such a system constitutional, and that this Court's "authorized" such a system, Grange Br. 18, 30, 48, in arguing that the Court of Appeals' decision "directly contradicts this Court's *ruling* in *Jones*." Grange Br. 32 (emphasis added). At best the Grange is overreaching: the *Jones* opinion only discussed a nonpartisan blanket primary as a means to advance compelling state interests which were not present in *Jones* and are not present here. At worst the Grange is guilty of ignoring Chief Justice Marshall's admonition: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 6 Wheat. 264, 399-400, 5 L.Ed. 257 (1821); *see also Parents Involved in Community Schools v. Seattle School Dist. No. 1*, __ U.S. __, 127 S.Ct. 2738, 2762 (2007) (citing *Central Va. Community College v. Katz*, 546 U.S. 356, 363 (2006)).

### 1. All Blanket Primaries Must Comply with the First Amendment.

At their core, Petitioners' arguments assume that the Court intended to bless a nonpartisan blanket primary system as a means of freely forcing candidates on political parties and allowing party names to be freely used on ballots by all comers. This reads too much into the *Jones* dicta and ignores the context of the discussion. The specific primary described in *Jones* contemplates using political party names on ballots in conjunction with candidate names where those candidates have been nominated by the political parties whose names are used. *See Jones*, 530 U.S. at 598 n.8 (Stevens, J., dissenting) (explaining that "what the Court calls a 'nonpartisan primary' . . . [is one] in which candidates *previously nominated* by the various political parties and independent candidates compete." (emphasis added)). At no point in *Jones* did the Court suggest that the State was free to appropriate political party names for its own uses.

This Court's opinion in *Jones* held that State interference with a party's right to select a candidate imposes a heavy burden on First Amendment rights. *Id.* at 582 (majority opinion). Nevertheless, Petitioners interpret *Jones* to mean the State can interfere with the party's selection of *one or two* candidates in the "top two" system while imposing only a *de minimis* burden on First Amendment rights. This converts the focus of *Jones* from vigorous protection of First Amendment rights to authorizing an invasion of those rights. Respondents respectfully suggest that the fundamental point of the discussion in *Jones* was protecting associational rights, not providing a loophole by which States may meddle in the internal affairs of political parties.

### 2. Initiative 872 Did Not Create a Nonpartisan Blanket Primary.

Nor should the Court accept the State's *ipse dixit* that Initiative 872 created a nonpartisan blanket primary. The State contends that printing of the party's name after the candidate's name on the ballot does not form an association between the candidate and the party. State Br. 44. This strains credulity.

Throughout Washington's history, the printing of a party name after a candidate's name on ballots has indicated an association with the named party. Conversely, candidates not formally nominated by a party could appear on the ballot as "an electors' or independent candidate for the office," but not as a party candidate. *State ex rel. Hewen v. Elliott*, 48 P. 734, 735 (Wash. 1897).

The reason for this rule was evident – an official party designation on the ballot carried with it an inherent message to the voter that the party had nominated the candidate as its standard bearer:

> The law gives [the voter] the right to assume that, if he wishes to vote for all the candidates of the Republican party, all he has to do is to make his check mark opposite the words "Republican Ticket," at the head of its group of candidates; and that, if he desires to vote for the Democratic, People's, Prohibition, or other party, he has only to make his check opposite the words which designate such party, printed at the head of the respective groups of candidates.

*State ex rel. Bloomfield v. Weir*, 31 P. 419, 420 (Wash. 1892).[27] As a result, placing an independent candidate under the designation of a party that had not nominated him would be "opening the door to the perpetuation of a fraud, – would in fact be offering an inducement therefor [sic]." *Philips v. Curtis*, 38 P. 405, 407 (Idaho 1894) (candidate nominated only by electors had no right to appear on the ballot as a candidate of the "People's Party").

Sponsors of Initiative 872 did not promote it as changing the historic partisan meaning of Washington ballots; they promoted it as a continuation.[28] The State's official Explanatory Statement indicated that historic election practices would continue. "This measure would change the way that candidates qualify to appear on the general election ballot, but would not otherwise change the way general elections are conducted." J.A. 405.

As noted above, selecting a party in a declaration of candidacy binds the candidate's name and the party's name for the duration of the campaign. Provisions of state law reinforce the binding nature of the party identification used on the primary ballot. For example, any candidate who declares a party preference must thereafter identify

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[27] In the earliest days of Washington's statehood, ballots were organized by party, and voters could vote for a compendium of candidates under that party heading. Voters could also modify the slate by erasing candidates they did not wish to support. *See Weir*, 31 P. at 419-20.

[28] "[T]he party designations will appear after the candidates' names, and the voter will be able to vote for any candidate for that office (just as they now do in the blanket primary)." J.A. 69. A Frequently Asked Questions document distributed by sponsors of the Initiative assured voters that "candidates will *continue* to express a political party preference when they file for office and that party designation will appear on the ballot." J.A. 169 (emphasis added).

themselves with that "party designation" in all political advertising. WASH. REV. CODE § 42.17.510(1). This use of party designation is to indicate the "candidate's political party." WASH. ADMIN. CODE 390-18-020. Not only the candidate, but anyone who supports or opposes the candidate must also identify the candidate's political party in advertising using the party designation. *Id.*

In sum, merely affixing the (inaccurate) label of "nonpartisan" to the Initiative 872 blanket primary cannot satisfy the constitutional scrutiny mandated in *Jones*. The lower courts appropriately rejected this argument as a sufficient basis to save the Initiative.

### C. The State Has Not Removed Itself from the Party Nomination Process – It Has Removed the Party from the Party Nomination Process.

The State nevertheless contends that it may force candidates upon unwilling political parties so long as it does so in a process that purportedly does not "nominate" candidates. State Br. 41-47. The State's distinction is doubly doubtful.

First, Initiative 872 creates an election system in which candidates and party names are associated on public ballots whether or not the party and the candidate both agree to the association. It violates the defining characteristic of *freedom* of association: "a corollary of the right to associate is the right not to associate." *Jones*, 530 U.S. at 574. Pursuant to Initiative 872, voters in a primary determine which candidates – and their associated party names – advance to the general election. Thus, whether the Initiative 872 primary "nominates" or merely

"winnows," as the State and Grange allege, these are "two sides of the same coin." Grange Pet. App. 18a at n.14.

Second, the State's suggestion that party candidates are not nominated by voters under Initiative 872 ignores the plain meanings of "nominate" and "primary." "Nominate" means: "to propose by name as a candidate, especially for election." Grange Pet. App. 64a at n.17 (quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000)). "'Primary' has been defined as an 'election in which qualified voters nominate or express a preference for a particular candidate or group of candidates for political office . . . ' and 'a preliminary election in which voters nominate party candidates for office." *Washington State Grange v. Locke*, 105 P.3d 9, 20 (Wash. 2004). The purpose of Initiative 872 is to use a primary to select two partisan candidates and present them to the electorate at the general election in order to fill a partisan elective office. J.A. 411-12, 413-14 (Initiative 872, §§ 4, 7(2)).[29] It therefore "nominates" candidates.

When Initiative 872 is examined in the context of Washington's other election laws, it is apparent that candidates using the names of political parties are understood

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[29] Initiative 872 creates a primary, not an election, as Louisiana notes in its amicus brief. Louisiana Br. *Amicus Curiae* 4. A candidate who wins Initiative 872's primary, even one who receives a majority of the vote, must stand for election in November. The circumstances in Louisiana may differ from those in Washington in at least one other respect: Louisiana's political parties apparently do not object to the system as part of their campaign processes. As this Court held in *Tashjian v. Republican Party of Conn.*, a political party has the right to decide how best to advance its interests even where its decisions differ from ones that might be reached by the State or another political party. 479 U.S. 208, 224 (1986).

by all to be party nominees.[30] Those laws and campaign finance regulations are based on the explicit assumption that political parties have nominees on the general election ballot. The support obtained by those nominees is used as the measure whether a party is a major political party, entitled to certain treatment under the campaign finance laws, and entitled to have caucuses in the Legislature who appoint voting members of the State Redistricting Commission. These general election party nominees have to get to the general election ballot somehow. But as the district court concluded: "The State and County Auditors recognize no nomination process for a major party other than by the primary. Under Initiative 872, the only way for a partisan candidate to reach the general election is through the 'top two' primary." Grange Pet. App. 62a (internal citation omitted).

Initiative 872 is a procedure for nominating party candidates for partisan offices for the general election. The Grange may have tinkered with the wording of the definition of "primary" to avoid using the word "nominating," J.A. 412 (Initiative 872, § 5), but word-play in describing the procedure alters neither its underlying substance, nor the constitutional result.

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[30] *See* Statement of the Case, Sections B and C *supra*.

### D. The Grange's Additional Arguments Do Not Warrant Creating a "Washington State" Exception to the Principles Affirmed in *Jones*.

The State has a statutory duty to defend Initiative 872,[31] but even it does not join the Grange's remaining arguments. The State's restraint is appropriate. For example, the Grange attempts to overcome the fundamental associational rights articulated in *Jones* with a supposed First Amendment right of a candidate to freely use a party's name on the ballot without permission. No such right is recognized. Nor do general principles of severability or federalism cure the constitutional defects inherent in the Initiative.

#### 1. The Constitution Does Not Afford Candidates Any Right to Force Themselves on Political Parties.

The Grange seeks to transform a *political party's right* to determine the candidates with whom its name will be associated on a ballot into a *candidate's right* to appropriate a party label on election ballots.[32] The Grange argues that because the Democratic Party's name on the ballot conveys information about a candidate's political positions to voters, individual candidates have a right to use the ballot to "tell[] voters important information about him or

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[31] WASH. REV. CODE § 43.10.030.

[32] Grange Br. 23-24 ("If it is unconstitutional for a State to allow a person to make a short statement on the ballot to give voters a piece of information which that person thinks is politically significant about him or her self [sic], then it is equally unconstitutional for a State to allow a political party to make a short statement on the ballot to give voters a piece of information which the party thinks is politically significant about that person.").

her self, such as the name of the political party (if any) that he or she personally prefers." Grange Br. 29. The Democratic Party does not question a political candidate's First Amendment right to express a political viewpoint as part of a campaign for public office. As the Court of Appeals noted, however, this case does not involve "an expression of a party preference *other than as a ballot designation*[.]" Grange Pet. App. 26a (emphasis added).

Political parties have a long-recognized, "inescapably expressive right" to select the standard bearer best able to convey the party's message. *Timmons*, 520 U.S. at 373 (Stevens, J., dissenting). Parties exercise this right by choosing the candidates who will use the party label in their campaigns and on the election ballot. Indeed, a party "use[s] the ballot to communicate information about itself and its candidate to the voters[.]" *Id.* at 363 (majority opinion). "[P]arty labels provide a shorthand designation of the views of *party candidates* on matters of public concern, [and] the identification of candidates with particular parties plays a role in the process by which voters inform themselves for the exercise of the franchise." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 220 (1986) (emphasis added).

This same rationale has never been extended to *a candidate's choice* of a party label. Thus, lower courts have affirmed that the free speech rights of a candidate "do not trump [a party's] right to identify its membership based on political beliefs[.]" *Duke v. Massey*, 87 F.3d 1226, 1232-33 (11th Cir. 1996); *see also Duke v. Cleland*, 954 F.2d 1526, 1530 (11th Cir.), *cert. denied*, 502 U.S. 1086 (1992) (recognizing that a candidate has *no constitutional right* to associate with a political party that is an "unwilling partner"). This Court consistently has established that

ballots are "not . . . a general forum for political expression," but serve only to nominate and elect candidates to office. *Burdick*, 504 U.S. at 445 (Kennedy, J., dissenting), *see also Timmons*, 520 U.S. at 363; *Clingman*, 544 U.S. at 609 (Stevens, J., dissenting).

A holding that the First Amendment provides candidates with a green light to drive their campaigning onto election ballots would "undermine the ballot's purpose by transforming it from a means of choosing candidates to a billboard for political advertising." *Timmons*, 520 U.S. at 365 (recognizing the concern that major party "fusion" candidates could manipulate minor party names to jointly associate themselves with "popular names or catchphrases"). In fact, Washington law prohibits candidates from displaying campaign flyers or other electioneering statements about their political positions inside the voting booth (or anywhere near it). WASH. REV. CODE § 29A.84.510(1)(a). The Grange's assertion that candidates have a right to use ballots to express political viewpoints inside the polling place is contrary to well established prohibitions on electioneering.[33]

The Court of Appeals faithfully adhered to this Court's guidance, affirming that "a statement of party preference on the ballot is more than mere voter information. It represents an expression of partisanship and occupies a privileged position as the only information about the candidates (apart from their names) that appears on the

[33] It is doubtful that Washington voters intended to create such a right. Initiative 872, and all the campaign rhetoric around it in the record of this case, focuses on creating a power in voters to influence the selection of party candidates. Nowhere is any mention made of creating a right in candidates to appropriate party names for their own political use in the polling place.

primary ballot." Grange Pet. App. 20a; *cf. Anderson v. Martin*, 375 U.S. 399, 402 (1964) (by including a candidate's race as a ballot label, "the State indicates [such a consideration] is an important – perhaps paramount – consideration in the citizen's choice").

Moreover, even if, as some lower courts have suggested, a candidate has a First Amendment right to "speak" on the ballot,[34] any limitations on that right represent a *de minimis* burden on speech. The candidate is deprived of the misleading association only at the instant of voting, but has ample alternative means of engaging the electorate.[35] *See Anderson v. Celebrezze*, 460 U.S. 780, 788

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[34] Some lower courts have found that state-imposed restrictions on a candidate's choice of a party label might in some circumstances burden protected speech. In *Rubin v. City of Santa Monica*, the Ninth Circuit found that the plaintiff's speech was impaired by a restriction limiting how he could "designate his occupation on the ballot." *Rubin v. City of Santa Monica*, 308 F.3d 1008, 1014 (9th Cir. 2002). The court, however, determined that such a burden was not severe and ample alternative channels existed, particularly the Candidate Statement, for communicating plaintiff's preferred designation of "peace activist" to the electorate. *Id.* at 1016. In *Rosen v. Brown*, 970 F.2d 169 (6th Cir. 1992), the Sixth Circuit found unconstitutional an Ohio election provision barring a candidate's party designation of "Independent" from ballot. Yet in identifying the right at issue, the court found only that "plaintiffs have established that [Ohio law] burdens the First and Fourteenth Amendment rights of the *supporters* of Independent candidates," and did not reach the rights of candidates themselves. *Id.* at 176 (emphasis added).

[35] The Grange's repeated invocation of this Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), is misplaced, as neither the Court of Appeals nor the district court decisions can be seriously described as prohibiting or banning political speech during political campaigns. The factual situation at issue in *White* was whether a Minnesota judicial canon that prevented judges from announcing their views on legal and political issues during their campaigns impermissibly infringed those candidates' First Amendment

(Continued on following page)

(1983) ("[A]n election campaign is an effective platform for the expression of views on the issues of the day[.]"); *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 186 (1979) ("[A]n election campaign is a means of disseminating ideas[.]"). In *Celebrezze*, this Court recognized that through modern political campaigns, the electorate "is informed on a day-to-day basis about events and issues that affect election choices and about the ever-changing popularity of individual candidates." 460 U.S. at 797.

Additionally, the burden, if any, of preventing a candidate from listing a party "preference" on the ballot when the candidate has not been selected by the party must be weighted against the countervailing effects of the impact of that candidate's "preferred" label on both the political party's associational rights and the interests of the voters. "[I]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on the voters." *Id.* at 786 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Both the Court of Appeals and the district court recognized that inclusion of a candidate's preference "creates the impression of associational ties between the candidate and the preferred party, irrespective of any actual connection or the party's desire to distance itself from a particular candidate." Grange Pet. App. 22a; Grange Pet. App. 68a (the district court concluded that "[a]ny attempt to distinguish a 'preferred'

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freedom of speech. Although this Court found the canon speech ban unconstitutional, *White* does not and cannot be construed as standing for the proposition that candidates have a First Amendment right to drag their campaigns onto the ballot. The issue here is what association may be indicated on the *election ballot*, not what may be said in *public debate*.

party from an 'affiliated' party is unavailing in light of Washington law."). Any burden on a candidate's First Amendment rights is slight when viewed against the substantial burden that Initiative 872 imposes on both the associational rights of unwilling political parties and the false impression conveyed to the voters.

**2. Initiative 872 is Not Severable.**

The Grange briefly argues that the lower courts should have rewritten Initiative 872 by striking down only a portion of Section 4 of the Initiative. Grange Br. 41-42.

Severability of a state statute is an issue of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 140 (1996). At the outset, Initiative 872 does not contain a severability clause. While this is not dispositive under Washington law, it nonetheless shows the absence of "evidence that the legislature [or the people in their legislative capacity] would have enacted the constitutional portions of a statute without the unconstitutional portions[.]" *United States v. Hoffman*, 116 P.3d 999, 1008 (Wash. 2005) (citing *State v. Anderson*, 501 P.2d 184, 186 (Wash. 1972)).

More significantly, an initiative is not severable if the constitutional and unconstitutional provisions "are so connected that the Legislature would not have passed one without the other, or that the balance is useless to accomplish the legislative purpose." *Priorities First v. City of Spokane*, 968 P.2d 431, 434 (Wash. App. 1998) (citing *Leonard v. City of Spokane*, 897 P.2d 358, 361-62 (Wash. 1995)). The purpose of Initiative 872 was to allow voters to select general election candidates in partisan races. The purpose was not to convert all elected offices in the state to

nonpartisan offices and create conflicts with numerous statutes, regulations and even constitutional provisions.

In *City of Seattle v. Yes for Seattle*, 93 P.3d 176 (Wash. App. 2004), *review denied*, 108 P.3d 1228 (Wash. 2005), the Washington Court of Appeals elaborated on the severability of initiatives. The court concluded that City of Seattle Initiative 80 ("I-80") exceeded the scope of the local initiative power, because it conflicted with Washington State's Growth Management Act. *Id.* at 181.[36] Although initiative supporters urged the court to invalidate only portions of the initiative, the court refused for two reasons.

First, the court explained that "the development aspects of I-80 are pervasive, with most sections of the initiative dealing with development. The non-development sections on their own would not accomplish the goals of the initiative, as development and land use controls play the central role in the initiative." *Id.* at 182. Second, the Court examined the ballot title of the initiative, which it considered "important because 'voters will often make their decision based on the title of the act alone, without ever reading the body of it.'" *Id.* (quoting *Citizens for Responsible Wildlife Mgmt. v. State*, 71 P.3d 644, 653 (Wash. 2003)). The Court concluded that the ballot title "characterize[d] the initiative as primarily concerning development." *Id.*; *see also United States v. Manning*, 434 F. Supp. 2d 988, 1023 (E.D. Wash. 2006) (striking down

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[36] Under the Washington Constitution, initiatives that exceed the scope of the initiative power are invalid. *See, e.g., Philadelphia II v. Gregoire*, 911 P.2d 389, 393 (Wash. 1996). In *Yes for Seattle*, the court held that I-80 exceeded the initiative power because it interfered with development regulation functions delegated exclusively to local legislative bodies. 93 P.3d at 180-81.

Washington Initiative 297 in its entirety because, *inter alia*, severability would undermine the "primary" purpose of the initiative).

Both of these reasons apply equally to Initiative 872. Carefully crafted words in Initiative 872's ballot title[37] confirmed to voters that primary ballots would continue to indicate political parties along with candidates:

> **Ballot Title**
> Initiative Measure 872 concerns elections for *partisan* offices.
>
> This measure would allow voters to select among all candidates in a primary. Ballots would indicate candidates' party preference. The two candidates receiving most votes advance to the general election, regardless of party.

J.A. 400 (emphasis added). "[W]ords in a title must be taken in their *common and ordinary meanings*, and the legislature cannot in the body of an act impose another or unusual meaning upon a term used in the title without disclosing such special meaning therein." *Locke*, 105 P.3d at 18.

In urging severability, the Grange would leave fragments of Initiative 872 on the books but remove a cardinal enticement to the people's passage of the measure – that candidates for partisan office would "continue" to designate their party. J.A. 169. Moreover, although the Grange asks this Court to sever only section four of Initiative 872, virtually the entire Initiative references and incorporates

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[37] The ballot title for an Initiative is limited to ten words and the description is limited to thirty words. WASH. REV. CODE § 29A.72.050.

the candidates' party designation. *See* Grange Pet. App. 88a-89a (citing Initiative 872, §§ 4, 5, 7(2), 7(3), 9(3), 11, 12). As the district court correctly concluded, deleting each of these sections "would eliminate any reference to party preference or affiliation, and would convert a partisan election process into a nonpartisan election process." Grange Pet. App. 89a. The lower courts properly declined the Grange's suggestion to sever Initiative 872 beyond recognition.

### 3. "Laboratories of Democracy" May Not "Experiment" With Abridging the Core Freedoms That Make Democracy Possible.

Finally, the Grange argues that this Court must uphold Initiative 872 in order to protect the right of States to act as laboratories of democracy and to conduct social and economic experiments. Grange Br. 43-45. The Fourteenth Amendment was passed, however, precisely to prevent States from conducting social experiments that invade rights protected by the United States Constitution. The rights at issue in this case are protected against State mandated social experiments such as Initiative 872 because these rights buttress the core principles of American democracy:

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. . . . Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party "select[s] a standard bearer who best represents the party's ideologies and preferences."

*Jones*, 530 U.S. at 574.

Neither the decisions below, nor Respondents have suggested – as the Grange would have this Court believe – that federalism "prohibits Washington from adopting a primary system different from . . . other States." Grange Br. 47. Washington may adopt any primary system it chooses, *provided* the system respects constitutional rights:

> A State's broad power to regulate the time, place, and manner of elections 'does not extinguish the State's responsibility to observe the limits establish by the First Amendment rights of the State's citizens.'

*Eu*, 489 U.S. at 222 (quoting *Tashjian*, 479 U.S. at 217). Of course, "when States regulate parties' internal processes, they must act within the limits imposed by the Constitution." *Jones*, 530 U.S. at 573; *see also Chandler v. Miller*, 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting) (recognizing that "novel experiments, of course, must comply with the United States Constitution").

To the extent Initiative 872 is an experiment, it is an experiment in giving the State the power to force a political party to change its message. It is an experiment in giving the State the power to suppress views that do not conform to mainstream opinion. It is an experiment in giving the State the right to dictate who is (and who is not) associated with a political party. In short, Initiative 872 is not an experiment that federalism is intended to protect: it is an experiment that federalism is intended to restrain. Regardless, the Grange cannot save an otherwise unconstitutional initiative simply by labeling it an "experiment."

## CONCLUSION

The most basic symbol possessed by a political party is its name. Generations of citizens have breathed meaning into that symbol with their labor, their dollars, and their voices. No one – and certainly not the State – should be given the right to hijack that symbol. This Court should affirm the reasoned decisions of district court and the Court of Appeals, and declare Initiative 872 unconstitutional.

Respectfully submitted,

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